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9 Burbank Police Department, Burbank Police Officers  
10 Adam Baumgarten, and Michael Edwards  
11

12 UNITED STATES DISTRICT COURT  
13 CENTRAL DISTRICT OF CALIFORNIA  
14

15 PRESTON SMITH, an individual;

16 Plaintiff,

17 v.

18 CITY OF BURBANK, BURBANK  
19 POLICE DEPARTMENT, BURBANK  
20 POLICE DEPARTMENT OFFICER  
21 GUNN; BURBANK POLICE  
22 DEPARTMENT OFFICER  
23 BAUMGARTEN; BURBANK  
24 POLICE DEPARTMENT OFFICER  
25 EDWARDS; AND DOES 1  
26 THROUGH 100, INCLUSIVE  
27

28 Defendants.

) Case No. CV10-08840-R-AGR

) MEMORANDUM OF  
) CONTENTIONS OF FACT AND  
) LAW OF DEFENDANTS CITY OF  
) BURBANK, BURBANK POLICE  
) DEPARTMENT, BURBANK  
) POLICE OFFICERS ADAM  
) BAUMGARTEN AND MICHAEL  
) EDWARDS

**L.R. 16-4.1 Claims and Defenses**

**(a) Plaintiffs' Claims:**

Claim 1 as against the Defendant police officers: The Defendant police officers violated the Fourth Amendment to the Constitution.

Claim 2 as against the Defendant City of Burbank/Burbank Police Department: The Defendants City of Burbank/Burbank Police Department violated the Fourth Amendment to the Constitution.

Claim 3 as against the Defendant police officers and the City of Burbank/Burbank Police Department: The Defendants violated California Civil Procedure code § 52.1.

Claim 4 as against the Defendant police and officers and the City of Burbank/Burbank Police Department: The Defendants intentionally inflicted emotional distress.

Claim 5 as against the Defendant police officers and the City of Burbank/Burbank Police Department: The Defendants committed assault and battery.

**(b) Elements Required to Prove Plaintiff's Claim 1:**

1. That the acts or omissions of the defendant police officers were intentional;
2. That the defendant police officers acted under color of law;
3. That the acts or omissions of the defendant police officers were the legal cause of the deprivation of the plaintiff's constitutional rights as defined by the Fourth Amendment;
4. That the defendant police officers' unconstitutional acts or omissions were the legal cause of damages to plaintiff.

**Elements Required to Prove Plaintiff's Claim 2:**

1. That the acts or omissions of the defendant police officers were intentional;

- 1           2. That the defendant police officers acted under color of law;
- 2           3. That the acts or omissions of the defendant police officers were the legal
- 3           cause of the deprivation of plaintiff's constitutional rights as defined by
- 4           the Fourth Amendment;
- 5           4. That the defendant police officers' unconstitutional acts or omissions
- 6           were the legal cause of damages to plaintiff;
- 7           5. That the unconstitutional acts or omissions legally causing damage to
- 8           plaintiff was the result of an official policy of the City of
- 9           Burbank/Burbank Police Department.

10           Elements Required to Prove Plaintiff's Claim 3:

- 11           1. That plaintiff timely filed a government claim alleging facts that satisfy
- 12           the elements of this cause of action, and that the City of Burbank denied
- 13           the claim.
- 14           2. That each individual defendant, by threat, intimidation or coercion, tried
- 15           to or did prevent the plaintiff from doing something he had the right to do
- 16           under Constitutional law, or to force the plaintiff to do something that he
- 17           was not required to do under Constitutional law.
- 18           3. That the threat, intimidation or coercion was egregious, deliberate and
- 19           spiteful, not negligent.
- 20           4. That the threat, intimidation or coercion legally caused damage to
- 21           plaintiff.

22           Elements Required to Prove Plaintiff's Claim 4:

- 23           1. That plaintiff timely filed a government claim alleging facts that satisfy
- 24           the elements of this cause of action, and that the City of Burbank denied
- 25           the claim.
- 26           2. That each defendant acted in an outrageous manner so extreme as to
- 27           exceed all bounds of that usually tolerated in a civilized society,
- 28           outrageous manner.

3. That each defendant intended to cause emotional distress or caused emotional distress with reckless disregard of the probability of causing emotional distress.
4. That plaintiff suffered severe emotional distress.
5. That each defendant's outrageous conduct was the actual and proximate cause of emotional distress
6. That each defendant's conduct was unprivileged.

Elements Required to Prove Plaintiff's Claim 5:

1. That plaintiff timely filed a government claim alleging facts that satisfy the elements of this cause of action, and that the City of Burbank denied the claim.
2. That each defendant used unreasonable force to effect arrest, prevent escape or overcome the resistance of the plaintiff.
3. That each defendant's use of excessive force was the legal cause of damage to plaintiff.
4. That each defendant's conduct was unprivileged.

(c) Key Evidence in Opposition to Plaintiff's Claims 1, 2, 3, 4, and 5:

1. On April 10, 2009, defendant Neil Gunn Jr., had reasonable suspicion/probable cause to detain plaintiff.
2. On April 10, 2009, plaintiff was on probation for multiple felony convictions.
3. On April 10, 2009, plaintiff intentionally and unlawfully fled from defendant Neil Gunn Jr.'s attempt to detain/arrest plaintiff.
4. On April 10, 2009, defendants Edwards and Baumgarten responded to the scene to assist defendant Neil Gunn Jr. in his attempt to detain/arrest plaintiff.

- 1 5. On April 10, 2009, defendants Edwards and Baumgarten used only
- 2 reasonable force to affect the arrest of plaintiff.
- 3 6. On April 10, 2009, plaintiff used force to resist arrest, prevent escape,
- 4 and overcome resistance.
- 5 7. Plaintiff pled guilty to willfully and unlawfully resisting, delaying and
- 6 obstructing the defendant police officers in the discharge of their duties.
- 7 8. Plaintiff pled guilty to running from defendant Gunn during his attempt
- 8 to obtain a lawful detention and despite orders to stop.
- 9 9. Plaintiff pled guilty to using elbows and hands in a fist to strike the
- 10 defendant police officers in their attempts to lawfully restrain the
- 11 plaintiff.
- 12 10. Plaintiff pled guilty to flailing his arms and kicking his legs at the
- 13 defendant police officers when they attempted to detain the plaintiff.
- 14 11. Plaintiff pled guilty to a violation of California Penal Code § 148(a)(1).
- 15 12. On April 10, 2009, plaintiff willfully and unlawfully used and was under
- 16 the influence of cocaine.
- 17 13. Plaintiff pled guilty to a violation of California Health and Safety Code §
- 18 11550(a).
- 19 14. The defendant police officers did not violate the plaintiff's constitutional
- 20 rights.
- 21 15. The conduct of the defendant police officers was not extreme and
- 22 outrageous under the facts and circumstances.
- 23 16. All contact between the defendant police officers and the plaintiff was
- 24 privileged.

1 17.The City of Burbank/Burbank Police Department does not maintain an  
2 unconstitutional policy, custom or practice that authorized or condoned  
3 any wrongful conduct which damaged plaintiff herein.

4 18.Plaintiff suffered no damages.

5 (d) Affirmative Defenses to Plaintiff's Claims 1 and 2:

6 The defendant police officers are entitled to qualified immunity.

7 Affirmative Defenses to Plaintiff's Claims 3, 4, and 5:

8 While technically not defendants' burden of proof, the defenses to plaintiffs  
9 claim are that:(1) plaintiff failed to timely file a government claim alleging  
10 the facts and circumstances giving rise to liability for plaintiff's state law  
11 claims, and that the defendant City of Burbank/Burbank Police Department  
12 denied the claim; (2) the defendants are immune from liability under  
13 California Government Code §§ 815.2, 818, 820, 820.2, 820.8, 821.6; (3) the  
14 defendants are immune from liability under California Penal Code § 835a,

15 (e) Elements Required to Establish Defendants' Affirmative Defense to  
16 Plaintiff's Claims 1 and 2:

17 The burden of persuading the Court that the individual defendants violated  
18 clearly establish law is on plaintiff. Plaintiff cannot simply point to a clearly  
19 established right in abstract form. Plaintiff must demonstrate, on the basis of  
20 closely analogous cases, that a reasonable police officer would have known  
21 that his conduct was clearly unlawful.

22 Elements Required to Establish Defendants' Affirmative Defense to  
23 Plaintiff's Claims 3, 4, and 5:

24 While technically not defendants' burden of proof, the defendants can and  
25 will establish that plaintiff failed to timely file a government claim, that  
26 plaintiff used force to resist arrest, that each defendant is not vicariously

1 liable for the conduct of each other defendant, that defendant pled guilty to  
2 resisting, delaying and obstructing the defendant police officers in the  
3 performance of their duties under *Humpreys v. Heck*, and that plaintiff's  
4 damages, if any, arise from the plaintiff's criminal conviction.

5 (f) Key Evidence in support of Affirmative Defense to Plaintiff's Claims 1, 2,,  
6 3, 4, and 5:

- 7 1. On April 10, 2009, defendant Neil Gunn Jr., had reasonable suspicion/  
8 probable cause to detain plaintiff.
- 9 2. On April 10, 2009, plaintiff was on probation for multiple felony  
10 convictions.
- 11 3. On April 10, 2009, plaintiff intentionally and unlawfully fled from  
12 defendant Neil Gunn Jr.'s attempt to detain/arrest plaintiff.
- 13 4. On April 10, 2009, defendants Edwards and Baumgarten responded to  
14 the scene to assist defendant Neil Gunn Jr. in his attempt to detain/arrest  
15 plaintiff.
- 16 5. On April 10, 2009, defendants Edwards and Baumgarten used only  
17 reasonable force to affect the arrest of plaintiff.
- 18 6. On April 10, 2009, plaintiff used force to resist arrest, prevent escape,  
19 and overcome resistance.
- 20 7. Plaintiff pled guilty to willfully and unlawfully resisting, delaying and  
21 obstructing the defendant police officers in the discharge of their duties.
- 22 8. Plaintiff pled guilty to running from defendant Gunn during his attempt  
23 to obtain a lawful detention and despite orders to stop.
- 24 9. Plaintiff pled guilty to using elbows and hands in a fist to strike the  
25 defendant police officers in their attempts to lawfully restrain the  
26 plaintiff.

1 10. Plaintiff pled guilty to flailing his arms and kicking his legs at the  
2 defendant police officers when they attempted to detain the plaintiff.

3 11. Plaintiff pled guilty to a violation of California Penal Code § 148(a)(1).

4 12. On April 10, 2009, plaintiff willfully and unlawfully used and was under  
5 the influence of cocaine.

6 13. Plaintiff pled guilty to a violation of California Health and Safety Code §  
7 11550(a).

8 14. The defendant police officers did not violate the plaintiff's constitutional  
9 rights.

10 15. The conduct of the defendant police officers was not extreme and  
11 outrageous under the facts and circumstances.

12 16. All contact between the defendant police officers and the plaintiff was  
13 privileged.

14 17. The City of Burbank/Burbank Police Department does not maintain an  
15 unconstitutional policy, custom or practice that authorized or condoned  
16 any wrongful conduct which damaged plaintiff herein.

17 18. Plaintiff suffered no damages.

18 (g) Similar statements by other parties:

19 None.

20 (h) Anticipated evidentiary issues:

21 None.

22 (i) Issues of Law:

23 1. Was plaintiff's constitutional rights violated, pursuant to the Fourth  
24 Amendment?

25 2. Did the defendant police officers have reasonable suspicion to  
26 detain/probable cause to arrest plaintiff?

27 3. Did plaintiff resist arrest and attempt to escape?



1 4. Did the defendant police officers act in good faith, under the facts and  
2 circumstances presented?

3 5. Were the defendant police officers privileged in using force to affect  
4 arrest and overcome resistance?

5 6. Was plaintiff damaged?

6 7. Was any constitutional violation resulting in damages legally caused by  
7 an unconstitutional policy of the City of Burbank?

8 **L.R. 16-4.3 Bifurcation of Issues:**

9 Defendants seek bifurcation of the liability of the City of Burbank/Burbank  
10 Police Department from the defendant police officers. Establishing a violation of  
11 the Fourth Amendment is a prerequisite to proving liability of the defendant police  
12 officers. However, evidence that would not otherwise be admissible against the  
13 defendant police officers might be admitted against the City of Burbank/Burbank  
14 Police Department in order to prove the liability of the City of Burbank/Burbank  
15 Police Department. Therefore, bifurcation will limit the time and expense of trial  
16 and preclude the prejudicial consideration of otherwise inadmissible evidence in  
17 the event there is a determination that there was no constitutional violation.

18 **L.R. 16-4.4 Jury Trial:**

19 The parties have requested jury trial.

20 **L.R. 16-4.5 Attorneys' Fees:**

21 Plaintiff may claim recovery of attorneys' fees. Defendants will seek  
22 recovery of attorneys' fees, pursuant to Title 42 USC § 1988, for the  
23 continued pursuit of the plaintiff's claims.

24 **L.R. 16-4.6 Abandonment of Issues:**

25 None.  
26  
27

1 DATED: May 21, 2012

2 Respectfully submitted,

3 Amelia Ann Albano  
4 City Attorney

5  
6 By: 

CAROL A. HUMISTON  
Sr. Assistant City Attorney  
Attorneys for City of Burbank,  
Burbank Police Department,  
Burbank Police Officers  
Adam Baumgarten, and Michael  
Edwards

**Arutyunyan, Lusine**

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**MEMORANDUM of CONTENTIONS of FACT and LAW filed by Defendant City of Burbank.**  
**(Humiston, Carol)**

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